IN THE MATTER OF ARBITRATION BETWEEN

AFSCME, AFL-CIO, MINNESOTA COUNCIL No. 65

Union

and

CITY OF BAXTER, MINNESOTA

Employer

ARBITRATION DECISION AND AWARD (Reponen Grievance)

BMS Case No. 07-PA-0316

Arbitrator:	Andrea Mitau Kircher
Date and Place of Hearing:	January 19, 2007 Baxter, Minnesota
Date Record Closed:	February 5, 2007
Date of Award:	March 2, 2007

APPEARANCES

For the Union:

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For the Employer:

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INTRODUCTION AND JURISDICTION

The City of Baxter ("Employer" or "City") and the American Federation of State, County and Municipal Employees, AFL-CIO, Minnesota Council 65, ("Union") are signatories to a labor agreement ("Contract") effective from January 1, 2005, through December 31, 2007. The Union represents all public employees of the City, except

supervisory, essential and confidential employees. The Grievant, Calvin "Bud" Reponen, was employed as the Recreation Program Supervisor and is a Union member.

The Grievance was duly filed July 12, 2006. The parties participated in the Grievance process, but were unable to resolve the dispute, and the matter was referred to arbitration. The parties selected the undersigned arbitrator in accordance with the Contract.

A hearing was held at the offices of the City of Baxter on January 19, 2007. At the hearing, the arbitrator accepted exhibits into the record; witnesses were sworn and testimony was presented subject to cross-examination. The parties filed letter briefs simultaneously on February 2, 2007, and the record closed upon receipt of the submissions February 5.

ISSUE

Each party stated the issue differently. After hearing the evidence and reviewing the Contract, the arbitrator's statement of the issue is:

Did the Employer violate Article V of the Contract when it eliminated its Recreation Supervisor position and terminated the employment of the incumbent, Bud Reponen?

If so, what should be the remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE V
EMPLOYER RIGHTS

Section 1. Inherent Managerial Rights. The exclusive representative recognizes that the Employer is not required to meeting *[sic]* and negotiate on matters of inherent managerial policy, which include but are not limited to, such areas of discretion or policy as the

functions and programs of the Employer, its overall budget, utilization of technology, its organizational structure, and the selection and direction and number of personnel….

Section 2. Utilization of Non-Bargaining Unit Employees. Nothing in this Agreement shall restrict the right of the Employer to contract out bargaining unit work or to utilize volunteers or supervisors to perform bargaining unit work, provided that such contracting out will not result in reduction of work for current bargaining unit employees. (Emphasis provided.)

FACTS

Bud Reponen ("Grievant") was hired in 1996 by the City of Baxter as a part time recreation director, and the job became full time in 1998. In this position, the Grievant administered recreational youth programs that served 495 young people in 1995 and grew to serve 1200-1300 young people by 2006. His job duties were wide ranging and included organizing the programs, budgeting, working with the Parks and Recreation Commission to make policies for the programs, recommending the hiring of seasonal workers and volunteers and supervising their work, scheduling use of the fields, coordinating with other City divisions and external agencies, overseeing publicity for the programs, understanding state and league rules for baseball and softball, as well as physically assisting in Park Maintenance work for the Recreation Department.[1] Both the City Administrator and the Parks and Recreation Commission supervised his work.[2] Prior to the advent of the current City Administrator, Dennis Coryell ("Administrator Coryell") in January 2004, the Grievant had a good work record. He was also active in Union affairs, was a union steward and served on the bargaining committee for the Contract.

During negotiations in 2004 and early 2005, the City relied on a recent comparable worth pay study. The Union was dissatisfied with the comparable worth

[1] Union Exhibit 21 , Description of the work of Recreation Supervisor.
[2] *Id.*

study, and the Grievant took a lead role in expressing that dissatisfaction to the Mayor, Mr. Coryell and the City Council.[3] The Grievant perceived that his relationship with Administrator Coryell went downhill after this activity. [4]

Meanwhile, the City and Independent School District No. 181, (School District") located in the neighboring city of Brainerd, Minnesota, had been discussing the possibility of entering into a joint powers agreement to provide recreational services to its citizens.[5] The School District had been running a community education program using some of the City of Baxter's facilities, and some believed it would be simpler and more efficient to integrate the two systems. The City and the School District entered into a joint powers agreement sometime in 2006, assigning specific responsibilities to each entity for running the newly integrated recreation program. The School District took on the administrative responsibility for coordinating the recreation program for the City, and the City continued maintaining the recreational fields and generating sponsorships from donors.[6] All of the City's seasonal recreation program employees were reemployed in 2006 and over 500 Baxter students participated in the fall recreation program.[7]

By a letter dated March 27, 2006, Administrator Coryell notified the Grievant that the position of Recreation Program Supervisor was being eliminated and that his employment would be terminated on June 30.[8] By a letter dated May 18, 2006, the Grievant wrote the City Administrator that he considered the employment action a layoff rather than a termination and asked to "bump" into the Park Maintenance Worker

[3] See Union Exhibits 11 12, and Testimony ("T.") of Grievant
[4] T., Grievant
[5] T., Darrel Olson has served as Mayor for two years and was a City Council Member for 4 years.
[6] Employer Exhibit 1.
[7] *Id.*
[8] Joint Exhibit 2.

classification for which he was qualified.[9] Administrator Coryell questioned his qualifications, but reinstated him as a Park Maintenance Worker at $11.80 per hour. This pay rate is Grade 2, Step 1 on the salary schedule, the lowest pay rate possible. The Grievant was also given the job subject to a six month probationary period. As a result, after ten years of employment with the City, the Grievant earned approximately one-half of the Grade 7, Step 7 salary of $21.43 per hour that he earned as Recreation Program Supervisor.

The Union filed a grievance on his behalf on July 12, 2006, claiming that the Employer contracted out the Grievant's job resulting in reduction of bargaining unit work in violation of Article V, Section 2. The parties attempted to resolve this matter through the grievance process, including an attempt at mediation, but were unable to do so.

UNION POSITION

The Union argues that Article V, Section 2 of the labor agreement means the City cannot eliminate the Grievant's job by contracting with the School District for it to perform the work instead of the Grievant, because that is a "reduction of work for current bargaining unit employees." The Union claims that the parties have a long history and practice of contracting out road plowing and mowing work, but only did so when there was more work than the regular employees could handle, and that historically, no work has been lost for bargaining unit members in the process. The Union argues that the work of the Recreation Program Supervisor job is also bargaining unit work and the Contract prohibits subcontracting it to outsiders. It also argues that Administrator Coryell exhibited animus toward the Grievant, which affects the reasonableness of the employment decisions at issue.

[9] Union Exhibit 9.

EMPLOYER POSITION

The City argues that it had authority under Article V to decide that it would be more efficient to merge recreation programs with the School District. The City entered into a joint powers agreement with the School District to control liability and insurance issues resulting from the sharing of fields and supervision, the City alleges. The City claims it has the right to cancel its recreation program. It argues that the proviso in Article V limiting contracting out does not apply to this situation, and that it did not violate the provision because there was no net loss of Union jobs.

DISCUSSION AND DECISION

The question of when an employer can legitimately contract with outsiders to do work that has been done by its union members has been a fertile area for disagreements between unions and management. The interest of the employer in creating efficiencies and financial savings often conflicts with the union's basic interest in job security for its members. Often the parties have not reached any agreement on this subject. In this case, however, the parties considered the issue of contracting out sometime in the mid 1980's and negotiated Article V Section 2, (hereafter, "Section 2")[10]. Interpretation of Section 2 is pivotal to deciding this dispute.

Arbitrators usually resolve disputes concerning the interpretation of a collective bargaining provision by using a sequential analysis to ascertain the intent of the parties. First, the arbitrator looks to the language of the Contract. If it is clear and unambiguous, that language should control. If that is not the case, the arbitrator should look to other indicia of the parties' intent. Among these are evidence of bargaining history and past practice. See Elkouri & Elkouri, How Arbitration Works, Ch. 9 (5th ed. 1997). The

[10] T., Gary Johnson, retired AFSCME Staff Representative.

resolution of this dispute centers on the way in which Section 2 limits the City's right to contract out bargaining unit work when it provides that "such contracting out will not result in reduction of work for current bargaining unit employees".

The Union argues that this limitation clearly applies to the facts of this case. The City claims that it does not, because it has not "reduced bargaining unit work", when the number of employees in the bargaining unit is the same now as it was prior to the joint powers agreement. It also claims that merging two recreation programs is not the same as "contracting out". Thus, the disputed language is ambiguous as applied to the facts of this case, and evidence of bargaining history and past practice will be considered as factors illuminating the intent of the parties.

Gary Johnson, retired AFSCME Council No. 65 representative, testified concerning bargaining history. He recalled drafting the language of Section 2 in the mid 1980's. At the time, the City wanted to subcontract some work and the Union wanted to insure that its members were not deprived of work because of contracting out. Section 2 was the result, a compromise agreed to during mediation, and it has remained unchanged for approximately 20 years. Mr. Johnson believed that the parties intended Section 2 to apply to loss of bargaining unit work, rather than loss of an individual from the bargaining unit.

Standing alone, the memory and beliefs of one person, such as Mr. Johnson, who was involved in negotiating specific language does not prove the intent of the parties, but his recollection lends support to the argument that the City agreed not to contract for outside help when its work could be done by current bargaining unit employees.

A. "Contracting Out"

The parties disagree about whether the term "contracting out" applies to this situation. The term "contracting out" or "subcontracting" in this context simply means that the employer enters into an agreement with an outside entity to do some of its work rather than assign the work to its union employees.

The City argues that it has not contracted out its work, but has merely ended an entire program that it once created. Nonetheless, the evidence establishes that the recreational services program has not been eliminated. Instead, the City and the School District entered into a joint powers agreement to continue providing the same recreational services to the City's children by the same seasonal employees who worked for the City as set out in Employer's Exhibit 1. The athletic fields and facilities continue to be used for the program and continue to be maintained by the City.[11] Although the City refers to its action as disposing of the program or merging the program, the facts indicate that the City's service to its citizens continues unabated, and it merely contracted with the School District to provide the administrative services previously provided by the Grievant. This fits the definition of "contracting out".

The City has contracted out previously during the years when Section 2 has been in effect. Witnesses explained that mowing and snow-plowing were sometimes too much work for the regular full-time employees to accomplish in the time required, and the City contracted with private companies to do this work with them. This occurred repeatedly over the twenty years that Section 2 has been in effect, and the work of bargaining unit members was never reduced as a result.[12]

[11] T., Reponen and Employer's Exhibit 1.
[12] T., Curt Paulson, President of the AFSCME local.

B. The Negotiated Limitation on Contracting Out.

The parties negotiated a restriction upon the City's authority to contract out when they agreed to Section 2. Contracting out bargaining unit work was authorized so long as it did not "result in reduction of work for current bargaining unit employees." The evidence indicates that bargaining unit work was reduced. When the Grievant was terminated, his work was contractually delegated to various School District Employees,[13] which resulted in reduction of bargaining unit work. That the City later changed the termination to a layoff and allowed the Grievant to bump into another position so that there was no net loss of Union employees does not affect the Contract interpretation issue. "Reduction of bargaining unit work" includes contracting with another public entity to accomplish the tasks that were previously the work of the Grievant. By so doing, the Employer violated Article V, Section 2 of the Contract.

C. Appropriate Remedy.

The Union asks me to reinstate the Grievant to his former position. But I do not have the authority under the Contract to invalidate the joint powers agreement, require the School District to transfer those duties back to the City, and reinstate the Grievant. Nor is it reasonable to reinstate him to his former position when the duties of the position have been absorbed by the School District.

Arbitral remedies for subcontracting violations are varied. For example, the employer can be ordered to cease and desist from further subcontracting so long as bargaining unit members are available to do the work. Monetary awards are issued to make restitution for lost earnings, but sometimes may not be awarded if the subcontracting was done in good faith.

[13] T., Bud Reponen; Employer Exhibit 1.

Considerable evidence suggests that the decision to subcontract administration of the recreation program was based in large part on Administrator Coryell's dissatisfaction with the Grievant's work and methods as opposed to other business reasons. First, there was no evidence of the financial efficiencies gained by changing the recreation program. Administrator Coryell testified that it was "a wash" financially. No evidence was introduced explaining just what liabilities and insurance issues were resolved by the agreement with the School District, although such improvements were alleged by the City in its post hearing argument. Further, Administrator Coryell was not satisfied with the Grievant's job performance. He issued the first negative performance review received by the Grievant during his ten-year career.[14] Administrator Coryell never observed the Grievant in the course of his work and only came to his office once or twice.[15] He communicated with the Grievant primarily and frequently by e-mail[16] which included such messages as this memo dated May 5, 2005:

> Your note explaining that you plan to work evening hours this week to avoid piling up overtime leaves me very uncomfortable. How does the City know what evening hours you are actually working? Yes, in the past I have allowed you to work some alternative hours from time to time, but only on a day-by-day, case-by-case basis. Now you want to do this an entire week at a time? I can't live with it. And I think you know very well what a dim view other employees take of this practice. EVERYONE would like to know what you do, and when.
> (Emphasis supplied.)

> Show me what hours you actually want to work and what you will be working on. Check it out with me, please. Then plan on accounting for eight hours a day working on what you said you would be working on. I don't want you doing this for a week at a time, and I won't allow it. Fair warning. I might ask others to verify where you are and what you're doing.[17]
> (Emphasis supplied.)

[14] Union Exhibit 15.
[15] T., Reponen.
[16] *Id.*
[17] Union Exhibit 13.

Administrator Coryell accused the Grievant of stealing trophies from the park's office trophy cases in a memo that was distributed to others. He sent a police officer to investigate, and in the memo, he disputed the truth of the Grievant's explanation to the officer that the trophies had nothing to do with the City, had been earned by his daughter's team, and had merely been used as decoration for a time. In the memo, he also claimed that the Grievant had failed to clean out a popcorn machine as directed and that this might be considered insubordination.[18] It later became clear that Administrator Coryell was mistaken in his belief that the City owned the trophies.

Administrator Coryell agreed to reinstate the Grievant after his termination and placed him in the lowest step of the lowest paid City job. In the letter sent to the Grievant confirming this arrangement, he expressed concern about the Grievant complaining about his treatment to others and ended with an admonition:

> The City of Baxter expects you to be a team player contributing to the overall morale of the work force and to do your job to the best of your abilities…Finally, your job will be primarily outside, and we would ask you to limit your visits to City Hall to only those most necessary to carry out provisions in your job description.[19]

It is more likely than not that the subcontracting decision was motivated by factors other than a good faith interest in improving the recreation program developed by the Grievant, especially when the most obvious result of the change was to eliminate the Grievant's job. A monetary award to the Grievant in the nature of back pay and reinstatement to the pay level of his previous position is appropriate.

[18] Union Exhibit 6.
[19] Union Exhibit 2.

AWARD

The Grievance is sustained. In compliance with the collective bargaining agreement, the Employer shall cease and desist from further subcontracting of bargaining unit work when current bargaining unit members are available to do the work.

The Grievant shall be paid for the difference between the pay he has received and the pay he would have received if he had been continuously employed as Recreation Program Supervisor from July 1, 2006 to the present, despite his current job classification. His pay rate will be "red circled" on the salary schedule, and he will continue to be eligible to receive cost-of-living increases.

Dated: March 2, 2007

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Andrea Mitau Kircher
Arbitrator